APPENDIX A

FILED
May 16, 2007
CATHY A. CATTERSON,
CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-50210
D.C. No. CR-02-01213-3-MLR

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

SANAE KOHIKI, a.k.a. Sange Kohiki, DEFENDANT-APPELLANT

No. 06-50231
D.C. No. CR-02-01212-R-2

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DAVID CANTER, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted April 12, 2007
Pasadena, California

MEMORANDUM*

Before: B. FLETCHER, McKEOWN, and BYBEE, Circuit Judges.

The facts and procedural posture of the case are known to the parties, and we do not repeat them here. David Canter ("Canter") was convicted of mail fraud, in violation of 18 U.S.C. §§ 2, 1341, and 2326, and Sanae Kohiki ("Kohiki") was convicted of mail fraud, in violation of 18 U.S.C. §§ 2 and 1341. On appeal, Canter and Kohiki challenge the district court's denial of their motions for new trials, and, in the alternative, each requests remand to the district court for a further evidentiary hearing.

Canter asserts that the government's failure to disclose a statement by John Sarabia- allegedly made to the police before Canter's trial- concerning Canter's involvement with the fraud violates *Brady v. Maryland*, 373 U.S. 83 (1963), and requires a new trial. Assuming *arguendo* that the statement was made, we agree with the district court that it was not material under *Brady* because there is not "a reasonable probability that, had the evidence

* This disposition is not appropriate for publication and is not precedent except as precedent except as provided by 9th Cir. R. 36-3.

been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433 (1995) (internal quotation marks omitted). In addition, the district court did not abuse its discretion in denying Canter's motion for a new trial based on newly discovered evidence. *See United States v. Sarno*, 73 F.3d 1470, 1507 (9th Cir. 1995). The alleged statement by John Sarabia does not entitle Canter to a new trial pursuant to Federal Rule of Criminal Procedure 33 because it does not "indicate that a new trial would probably result in acquittal." *United States v. Kulczyk*, 931 F.2d 542, 548 (9th Cir. 1991). Additionally, a declaration by Leo Sarabia- Canter's co-defendant- cannot qualify as newly discovered. *See United States v. Diggs*, 649 F. 2d 731, 740 (9th Cir.1981), *abrogated by United States v. Conney*, 728 F.2d 1195, 1201 (9th Cir. 1984), *abrogated on other grounds by Pierce v. Underwood*, 487 U.S. 552 (1988).

The district court did not abuse its discretion in denying Kohiki's motion for a new trial based on newly discovered evidence. *See Sarno*, 73 F.3d at 1507. Because John Sarabia's written declaration as to Canter is not relevant to Kohiki's case, it is not material and does not "indicate that a new trial would probably result in aquittal." *Kulczyk*, 931 F.2d at 548. In addition, a declaration by Leo Sarabia- Kohiki's co-defendant-cannot qualify as newly discovered. *See Diggs*, 649 F.2d at 740.

Given these findings, we conclude that remand is not necessary for a further evidentiary hearing.

Accordingly, we AFFIRM the district court's denial of Canter and Kohiki's motions for new trials.

APPENDIX B

FILED
JUN 26, 2007
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-50210
D.C. No. CR-02-01213-3-MLR
Central District of California, Los Angeles

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

SANAE KOHIKI, a.k.a. Sange Kohiki, DEFENDANT-APPELLANT

ORDER

Before: B. FLETCHER, McKEOWN, and BYBEE, Circuit Judges.

Judges McKeown and Bybee voted today to deny the petition for rehearing en banc, and Judge Fletcher recommended denying the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's petition for rehearing en banc, filed May 30, 2007, is DENIED.

APPENDIX C

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DOCKETED ON CM
APRIL 6, 2006
BY /s/ JWR 172

FILED
CLERK U.S. DISTRICT
COURT
APRIL 3 2006
CENTRAL DISTRICT OF
CALIFORNIA
BY /s/ W DEPUTY

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Case No.: CR 02-1213 (A) - R

UNITED STATES OF AMERICA, PLAINTIFF

v.

SANAE KOHIKI, DEFENDANT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court Finds As Follows:

On March 27, 2006, this court held a hearing on defendant Sanae Kohiki's ("defendant") fourth motion for new trial.

Defendant appeared with her counsel of record, Harland Braun, Esq. Assistant United States Attorneys Brian D. Hershman and Alicia Villarreal appeared for the government.

The court, after carefully considering the pleadings, declarations and documents filed by the parties as well as the testimony and argument presented at the hearing, orally denied the motion at the hearing. This order will supplement the court's oral ruling denying the motion. In connection with this Order, the court makes the Following Finding of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The court finds that the government produced all exculpatory and impeachment evidence consistent with its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972) in the above-captioned case as well as in *United States v. David Canter*, CR 02-1212 (A) - R.
2. The court finds that there is no credible or admissible evidence to support the allegations of David Canter that the government violated its *Brady* obligations in *United States v. David Canter*, CR 02-1212 (A) - R.
3. The court further finds that the allegations of alleged prosecutorial misconduct *United States v. David Canter*, CR 02-1212 (A) - R are not relevant

or probative with respect to the issues in the above-captioned case or defendant's motion for new trial.

4. The court further finds that defendant has not established the existence of any "new evidence" supporting a motion for new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure.

5. Any Conclusions of Law that also constitute Findings of Fact are hereby incorporated into these Finding of Fact.

CONCLUSIONS OF LAW

A. Defendant Has Not Established A Violation of Brady v. Maryland

1. In order to establish a *Brady* violation, defendant must show (1) that the material was exculpatory; (2) that the exculpatory material was not produced when it should have been; and (3) that the failure to timely produce the material "mattered," *i.e.*, was material. *United States v. Steinberg*, 99 F.3d 1486, 1489-90 (9th Cir. 1996).

2. Defendant asserts that the government committed a *Brady* violation in *United States v. Canter*, CR 02-1212 (A) - R by failing to disclose prior to trial John Sarabia's statement that defendant David Canter "had nothing to do with the fraudulent activity occurring at The Century Group." (Defendant's Motion at 11-12). Defendant's claim lacks merit because there is no admissible or credible evidence that the alleged statement was ever made by John Sarabia and the alleged statement, even if made, is not material.

3. Moreover, whether or not the government allegedly committed a *Brady* violation in *United States v. Canter*, CR 02-1212 (A) - R is not relevant or

probative of any issue in defendant's case, and does not constitute "new evidence" supporting a new trial under Rule 33. Given the weight of the evidence at trial and the lack of relevance and of probative value of an alleged *Brady* violation in a separate case, defendant's motion for new trial is without merit.

B. Outrageous Government Misconduct Did Not Occur in this Case

4. The court has considered defendant's claims individually and as a whole, and finds no factual basis for or legal merit to defendant's allegation that the government committed misconduct. There is nothing new in this fourth motion for new trial.

5. Any Finding of Fact that also constitute Conclusions of Law are hereby incorporated into these Conclusions of Law.

Based on the foregoing, defendant's fourth motion for new trial is DENIED.

IT IS SO FOUND AND ORDERED.

DATED: April 3, 2006

/s/ MANUEL L. REAL
HONORABLE MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

Presented by:
/s/ Brian D. Hershman
Brian D. Hershman
Assistant United States Attorney

APPENDIX D

ENTERED
CLERK U.S. DISTRICT COURT
MAR 29 2006
CENTRAL DISTRICT OF CALIFORNIA
BY /s/ S DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA vs. CR: 02-1213 (A) -R

Defendant: SANAE KOHIKI S. Security #...7351

Residence: (See presentation report) Mailing: (Same)

JUDGMENT AND PROBATION/COMMITMENT ORDER
Upon Re-Sentencing Pursuant to Mandate U.S.C.A. 9th Circuit

In the presence of the attorney for the government, the defendant appeared in person, on: March 27, 2006.

COUNSEL:

_____ WITHOUT COUNSEL:

However, the court advised defendant of right to counsel and asked if defendant desired to have counsel appointed by the Court and the defendant thereupon waived assistance of counsel.

__XX__ WITH COUNSEL: Harland Braun, retained

PLEA:

_____ GUILTY, and the Court being satisfied that there is a factual basis for the plea.

____ NOLO CONTENDERE ____ NOT GUILTY

FINDING:

There being a jury verdict of guilty, defendant has been convicted as charged of the offense(s) if: Mail Fraud, causing an act to be done in violation of Title 18 USC 1341, 2 as charged in counts 6, 7, 8 and 9 of the 1st superseding indictment.

JUDGMENT AND PROBATION/COMMITMENT ORDER:

The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court. The Court adjudged the defendant guilty as charged and convicted and ordered that it is the judgment of the court that:

IMPOSITION OF SENTENCE IS SUSPENDED, AND

IT IS FURTHER ADJUDGED that defendant shall be placed on probation for five (5) years under the following terms and conditions: the defendant 1) shall comply with the rules and regulations of the U.S. Probation Office and General Order 318; 2) shall during the period of community supervision pay the restitution in accordance with this judgment's orders pertaining to such payment; 3) shall perform twenty-five hundred (2500) hours of community service as directed by the Probation Officer; 4) shall appear in person before the Court every 120 days as directed by the Probation Officer.

IT IS FURTHER ORDERED that defendant make restitution in the total amount of $13,300.00, to victims as

set forth in a separate victim list prepared by the Probation Office which this Court adopts and which reflects the Court's determination of the amount due to each victim. The victim list, which shall be forwarded to the fiscal section of the Clerk's Office, shall remain confidential to protect the privacy interests of the victims. The defendant shall be held jointly and severally liable for the amount of restitution as ordered, payments in such increments and amounts as shall be determined by the Probation Officer.

IT IS FURTHER ORDERED that the bond of the defendant is exonerated.

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release set out on the reverse side of this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximus period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

Signed by: /s/ Manuel L. Real
District Judge Manuel L. Real

It is ordered that the Clerk deliver a copy of this Judgment and Probation/Commitment Order to the U.S. Marshal or other qualified officer.

Sherri R. Carter, Clerk of the Court

Dated/Filed: March 28, 2006

By: /s/ William Herrell
William Herrell, Deputy Clerk